

Law Offices of Bennet & Bennet PLLC

10 G Street, NE, 7th Floor Washington, DC 20002 Tel: (202) 371-1500 Fax: (202) 371-1558 e-mail: mail@bennetlaw.com www.bennetlaw.com Caressa D. Bennet Michael R. Bennet Marjorie G. Spivak Gregory W. Whiteaker Howard S. Shapiro Donald L. Herman, Jr. Rebecca L. Murphy Joshua P. Zeldis Of Counsel Michael K. Kurtis

Senior Communications Consultant Kenneth C. Johnson

Director of Technical Services Herbert C. Harris

Director of Government Affairs Jessica H. Bridges

December 1, 2004

Via Electronic Comment Filing System

Mr. Jeffrey J. Carlisle, Chief Wireline Competition Bureau Federal Communications Commission Washington, DC 20554

> Re: In the Matter of Request for Review by New Florence Telephone Company (SAC 421927) of Decision of Universal Service Administrator Regarding Suspension of High Cost Universal Service Support Payments and Request for Preemption of the Missouri Public Service Commission

CC Docket No. 96-45

Dear Mr. Carlisle:

New Florence Telephone Company ("New Florence"), by its attorneys and pursuant to 47 C.F.R. §§ 54.719(c) and 54.720(a), is filing this letter of appeal of the Universal Service Administrative Company's ("USAC") November 5, 2004 (Exhibit 1) suspension and withholding of all high cost support payments to New Florence. On October 15, 2004 (Exhibit 2), the Federal Communications Commission's ("FCC or "Commission") Wireline Competition Bureau ("Bureau") directed USAC to suspend all low-income and high cost support payments to New Florence until further notice. On October 22, 2004 (Exhibit 3), the Bureau directed USAC to continue to disburse monthly support payments to New Florence for the Commission's Lifeline program, but to continue its suspension of all monthly support payments for the high cost mechanisms. USAC initiated this suspension of high cost support payments with the September 2004 payments that were disbursed at the end of October 2004. Since the USAC action was implementing the Bureau's directive, New Florence is filing this appeal directly with the Bureau and not USAC. For the reasons set forth below, New Florence respectfully requests that the Bureau reconsider its action directing USAC to suspend New Florence's high cost monthly support payments and direct USAC to resume such payments, including payment of all amounts withheld since the effective date of the USAC suspension. In support thereof, the following is respectfully shown:

BACKGROUND

On September 30, 2004, the Missouri Public Service Commission ("MoPSC"), in a letter to the Commission, advised that it has declined to certify that Cass County Telephone Company ("Cass County") and New Florence were using their high cost support in accordance with Section 254(e) of the Communications Act of 1934, as amended ("Act"). A copy of that letter is appended hereto as Exhibit 4. New Florence understands that Cass County has been the subject of an ongoing investigation before the MoPSC as well as the FCC. While 66% of the ownership of New Florence is common with Cass County, there has been no investigation or even allegation of wrongdoing by New Florence. In point of fact, Mr. Robert Williams is the beneficial owner of one-third of the equity of new Florence and, prior to the MoPSC letter, had taken over as Chairman and Chief Operating Officer of the company exercising full control of the entire telephone company operation. Significantly, the MoPSC letter merely advised the FCC that the MoPSC was conducting a further inquiry of the named companies and awaiting the receipt of a third party audit. No allegation of any wrongdoing has been raised with respect to New Florence and the MoPSC expressly stated that a certification letter would be issued upon conclusion of its inquiry if it was confirmed that the universal service fund ("USF") support had been used in accordance with Section 254(e).²

Based on the MoPSC letter concerning certification for 2005, the Bureau directed USAC to immediately suspend all monthly USF support payments to New Florence, including Lifeline, high cost loop, interstate common line, local switching, and any safety net additive "immediately." Soon thereafter, on its own motion, the Bureau advised that "... we believe that USAC should continue to disburse monthly support payments... for the Lifeline program," while continuing to withhold high cost payments. In accordance with those directives, USAC informed New Florence that these high cost support suspensions began with September 2004 payments.

¹ 47 U.S.C. § 254(e).

See Exhibit 4.

See Exhibit 2.

See Exhibit 3.

As discussed *infra*, New Florence questions why its high cost support for 2004 has been suspended based on a 2005 certification letter.

APPEAL AND REQUEST

New Florence respectfully submits that the MoPSC erred in withholding its certification. Without prejudice to that position, New Florence believes that the Bureau erred in directing USAC to immediately suspend USF support for New Florence based solely upon the fact that the MoPSC declined to issue the requisite certification for New Florence to receive USF support after January 1, 2005. The result is that New Florence has been deprived of crucial high cost universal service support because of a degree of common ownership. The MoPSC does not even *allege* that New Florence has not been using its high cost support for the promotion and advancement of universal service in rural New Florence, Missouri.

New Florence submits that the MoPSC and the FCC have, without due process, 7 denied New Florence the high cost payments that it is due as a result of its compact with both the state of Missouri and the federal government pursuant to Section 254 of the Act to provide and to be reimbursed for its high cost universal service expenses. New Florence has been providing the rural citizens of New Florence, Missouri with high cost telecommunications services with the full expectation that it will receive its property interest in the form of high cost support monthly payments. Since the MoPSC October 1, 2004 certification would only be effective with respect to USF payments beginning January 1, 2005, the MoPSC, lacking any basis upon which to deny certification should have issued the requisite certification, knowing that it could have withdrawn that certification in advance of New Florence receiving any support thereunder if, after investigation and affording New Florence full rights of due process, the MoPSC determined that USF monies had not been properly utilized. The FCC's action in immediately suspending New Florence's USF support for 2004 based upon the MoPSC letter, compounds the injustice. By acting to immediately suspend USF support, the MoPSC's denial of universal service certification and the FCC's response deprives New Florence of both its property and due process rights, and has the effect of severely restricting the ability of New Florence to provide telecommunications service to its customers.

Since the MoPSC letter is directed toward New Florence and Cass County alone, New Florence assumes that it is being investigated because of the degree of common ownership. However, New Florence has never been formally so advised by the MoPSC and the members of the MoPSC have refused to meet with New Florence to discuss this matter until the external audit has concluded.

U.S.C.A. Const. Amend. 14.

The hallmark of "property" under the Fourteenth Amendment's due process clause is individual entitlement grounded in state law which cannot be removed except for cause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See also, Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (ruling that a state's withholding of expected payments for labor and services was a property interest).

⁹ U.S.C.A. Const. Amends. 5 and 14.

Mr. Jeffrey J. Carlisle, Chief December 1, 2004 Page 4

New Florence serves the high cost, sparsely-populated region of New Florence, Missouri and receives approximately \$65 per customer, per month in total high cost support. The provision of universal service in this sparsely-populated region is inherently costly and, absent high cost support, would not be economically rational. High cost support is crucial to the maintenance and upgrading of the facilities needed to serve these customers. Without this support, New Florence, with approximately 350 customers and lacking any economies of scale, cannot afford to absorb these costs for long. Without high cost universal service support, a situation resulting solely from the MoPSC's unjustified and unlawful withholding of certification as it waits on a pending third-party audit, New Florence's ability to provide telecommunications services is threatened.

The MoPSC has not provided even a scintilla of justification for its denial of universal service certification. As such, the MoPSC's denial of certification, leading to New Florence's loss of high cost support, violates the most basic tenets of administrative law. When a governmental entity decides to terminate payments "pending resolution of a controversy," it has to have some sort of justification. ¹⁰ Further, in order for an administrative agency to be able to deny a benefit, its decision must be supported by an actual reason. ¹¹ In the instant case, the MoPSC has provided no reason for withholding its certification and the FCC has provided no basis for relying upon such action to immediately suspend USF payments for 2004. The net result is the threatening of telecommunications service to the New Florence community without even an allegation of wrongdoing, let alone any due process adjudication. Significantly, New Florence submitted the same information to the MoPSC as every other ILEC submitted and demonstrated that it has used USF support as required. The MoPSC, based upon the same filings made by other ILECs, certified every other such ILEC that made a comparable submission.

The FCC realized the potential for immediate harm arising from its action by unilaterally rescinding its direction to suspend low income USF support. Yet, the FCC did not even take into account the impact that the immediate suspension of USF support might have on the ability of New Florence to continue providing service to those rural citizens who, while not eligible for Lifeline and Link Up support are nonetheless reliant on New Florence for the availability of basic local exchange service. ¹² In acting to suspend high cost support while continuing low income support, the FCC has acted in an arbitrary and capricious manner.

As an eligible telecommunications carrier ("ETC") serving a rural area, New Florence is eligible to receive universal service support. ¹³ This includes not just low-income support but

¹⁰ See Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

See Hornsby v. Allen, 326 F.2d 605 (C.A.Ga. 1964) (overruling a state liquor board that provided no reason for a decision to deny a liquor license).

The Commission should not be surprised to learn that with a total subscriber base of 350, there are no CLECs providing service to the New Florence exchange.

¹³ 47 U.S.C. § 214(e)(1).

Mr. Jeffrey J. Carlisle, Chief December 1, 2004 Page 5

high cost support, as well. In order to receive *either* type of USF support, the FCC requires state certification. 14 Since the same statute and certification requirement applies for eligibility for a carrier to receive any USF support, if the MoPSC decision to withhold certification is insufficient to warrant the immediate suspension of low income support, it is likewise insufficient to result in the loss of high income support. Obviously, withholding Lifeline assistance for low-income citizens in New Florence, Missouri without any allegation of wrongdoing on the part of the receiving carrier would be no more in the public interest than withholding high cost support is under these same circumstances. New Florence questions why withholding equally important high cost support used to provide essential telecommunications service to the citizens of New Florence, Missouri does not trigger the same public interest concerns. It stretches credibility to believe that somehow it is acceptable to suspend support for the underlying high cost network, based on absolutely no evidence to justify the suspension, when it is clearly *not* acceptable in the eyes of the Commission, to suspend Lifeline support. Surely, if the Commission's rules allow it to await the outcome of the MoPSC's inquiry and audit of New Florence and continue providing needed low-income support, the Commission can do the same with regards to essential high cost support. New Florence respectfully requests that the Commission reconsider its direction to USAC and allow New Florence to receive high cost support payments while the MoPSC conducts its investigation.

New Florence requests that high cost support for September, October, November, and December 2004 not be suspended since withholding this support is contrary to the Commission's rules. The FCC's rules require states to file an *annual* certification stating that all support will, in the future, be used for the upgrading and maintenance of services for which the support is intended. The MoPSC's withholding of certification concerns the 2005 calendar year. New Florence was properly certified for the 2004 calendar year in 2003 and, pursuant to its compact with the state of Missouri and the federal government, New Florence should be lawfully reimbursed for its provision of high cost universal service for September, October, November, and December of 2004. The FCC has the authority, pursuant to 47 C.F.R. § 54.725(b), to "disburse funds for any amount of support that is not the subject of an appeal." Since this proceeding is based solely on the MoPSC's certification letter for 2005 universal service support, high cost support for September through December of 2004 should not be the subject of this appeal. Accordingly, New Florence requests that the Commission direct USAC to disburse New Florence's high cost support for the remainder of 2004.

¹⁴ 47 C.F.R. § 54.314.

¹⁵ 47 C.F.R. § 54.314.

¹⁶ 7 C.F.R. § 54.725(b).

Making the remainder of high cost support for 2004 the subject of this proceeding violates the overwhelming prohibition against an administrative agency making a retroactive ruling absent specific statutory authority. *See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

Mr. Jeffrey J. Carlisle, Chief December 1, 2004 Page 6

RELIEF REQUESTED

For the foregoing reasons, New Florence respectfully requests that the Bureau reconsider its position directing USAC to immediately suspend New Florence's high cost monthly support payments and direct USAC to continue such payments until the MoPSC investigation is concluded and direct USAC to distribute high cost payments for September, October, November, and December 2004.

Respectfully submitted,

/s/ Michael K. Kurtis

Michael K. Kurtis Counsel for New Florence Telephone Company

Enclosures

cc (via electronic mail): Narda Jones, FCC

Gina Spade, FCC Thomas Buckley, FCC

Irene Flannery, USAC Karen Majcher, USAC Wess Henderson, MoPSC

Exhibit 1



Universal Service Administrative Company

Irene M. Flannery
Vice President – High Cost & Low Income Division
iflannery@universalservice.org

November 5, 2004

Mr. Robert Williams
Acting Chairman
New Florence Telephone Company
c/o South Holt Communication
118 East Nodaway
P.O. Box 227
Oregon, MO 64473

RE: Suspension of High Cost universal service support payments

Dear Mr. Williams:

On October 15, 2004, the Universal Service Administrative Company (USAC), the administrator of the universal service support mechanisms, received a letter from the Federal Communications Commission (FCC) directing USAC to suspend all high cost support payments to New Florence Telephone Company until further notice. In the letter, the FCC stated that it was unable to determine whether the high cost support payments to New Florence Telephone Company are being used in accordance with the FCC's rules and statutes.

Until this issue has been resolved, therefore, USAC will withhold all high cost support payments to New Florence Telephone Company. USAC initiated the suspension of high cost support payments with the September 2004 payments that were disbursed at the end of October 2004.

As is the case with any administrative decision made by the FCC or USAC, you have the right to appeal this decision. You may appeal to USAC or the FCC, and the appeal must be filed within 60 days of the issuance of the decision from USAC. The date on this letter, therefore, begins the 60-day window within which you may file an appeal. Your appeal must be **postmarked** within 60 days of this letter. Pursuant to FCC rules, failure to meet this requirement will result in automatic dismissal of your appeal. I recommend that you consult sections 54.719 through 54.725 (47 C.F.R. §§ 54.719 to 54.725) of the FCC's rules for the details associated with filing an appeal, but I will also provide you with some of the logistics of that process in the following paragraphs.

Mr. Robert Williams Page 2 November 5, 2004

Should you decide the appeal to USAC, you should direct the appeal to:

Universal Service Administrative Company 2000 L Street, NW – Suite 200 Washington, DC 20036 Attention: High Cost & Low Income Division – Appeals

Should you decide to appeal to the FCC, the method of your filing will determine where you should direct your appeal. If you are submitting your appeal via the United States Postal Service, you should direct the appeal to:

Federal Communications Commission Office of the Secretary 445-12th Street, SW Room TW-A325 Washington, DC 20554

Documents sent by Federal Express or any other express mail should use the following address:

Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743
(8:00A.M. - 5:30 P.M.ET)

For hand-delivered or messenger-delivered items, please use the following address:

Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, NE, Suite 110
Washington, DC 20002
(8:00A.M. - 7:00 P.M.)

For security purposes, hand-delivered or messenger-delivered documents will not be accepted if they are enclosed in an envelope. Any envelopes must be disposed of before entering the building. Hand deliveries must be held together with rubber bands or fasteners.

Appeals may also be submitted to the FCC electronically, either by the Electronics Comment Filing System (ECFS) or by fax. The FCC recommends filing with the ECFS to ensure timely filing. Instructions for using ECFS can be found on the ECFS page of the FCC web site (www.fcc.gov). Appeals to the FCC filed by fax must be faxed to 202-

Mr. Robert Williams Page 3 November 5, 2004

418-0187. Electronic appeals will be considered filed on a business day if they are received at any time before 12:00 A.M. (midnight), Eastern Standard Time. Fax transmissions will be considered filed on a business day if the complete transmission is received at any time before 12:00 A.M.

Please be sure to refer to <u>CC Docket No. 96-45</u> on all communications with the FCC. The appeal transmission must also provide your company's name and study area code, plus necessary contact information, including name, address, telephone number, fax number, and e-mail address of the person filing the appeal. Unless the appeal is by ECFS, please include a copy of the letter being appealed.

Please contact me if you have any questions.

Sincerely,

Shere M. Flamery

Vice President - High Cost & Low Income Division

IMF:EP:

cc: William England, Counsel for New Florence Telephone Company

Michael Kurtis, Counsel for New Florence Telephone Company

Jeffrey Carlisle, FCC

Narda Jones, FCC

Gina Spade, FCC

Thomas Buckley, FCC

Karen Majcher, USAC



Federal Communications Commission Washington, D.C. 20554

October 15, 2004

Ms. Irene Flannery
Vice President, High Cost and Low Income Division
Universal Service Administrative Company
2000 L Street NW, Suite 200
Washington, DC 20036

Dear Ms. Flannery:

On September 30, 2004, the Missouri Public Service Commission (Missouri Commission) declined to certify that Cass County Telephone Company (Cass County Telephone) and New Florence Telephone Company (New Florence Telephone) are using their high-cost universal service support in accordance with Section 254(e) of the Telecommunications Act of 1996. The Missouri Commission noted that it is currently conducting an investigation of both of these companies' use of universal service support and is awaiting the receipt of a third-party audit. See attached letter from Robert M. Clayton, III, Commissioner, Missouri Public Service Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, dated Sept. 30, 2004.

Based on the information available to us at this time, we are unable to determine if the high-cost and low-income support payments to Cass County Telephone and New Florence Telephone are being used in accordance with the statute and Federal Communication Commission rules. Until this issue is resolved, we direct USAC to suspend all monthly support payments (including Lifeline, high-cost loop, interstate common line, local switching and any safety net additive) to Cass County Telephone and New Florence Telephone immediately. Please inform Cass County Telephone and New Florence Telephone of this suspension and of their rights to challenge the suspension before the Commission.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact Gina Spade or Tom Buckley at 202-418-7400.

Sincerely,

Jeffrey J. Carlisle

Chief, Wireline Competition Bureau

cc: Kenneth Matzdorff, Chairman, Cass County Telephone Company and Chairman, New Florence Telephone Company
Robert Osborn, Cass County Telephone Company
E. Ashton Johnston, Counsel for Cass County Telephone Company
William England, Counsel for New Florence Telephone Company
Susan Duffy, Executive Director, Kansas Corporation Commission
Sandy Reams, Kansas Corporation Commission
Robert Quinn, Executive Director, Missouri Public Service Commission
Wess Henderson, Director, Utility Operations Division, Missouri Public Service Commission

Exhibit 3



Federal Communications Commission Washington, D.C. 20554

October 22, 2004

Ms. Irene Flannery Vice President, High Cost and Low Income Division Universal Service Administrative Company 2000 L Street NW, Suite 200 Washington, DC 20036

Dear Ms. Flannery:

On October 15, 2004, the Wireline Competition Bureau directed USCA to suspend all monthly support payments (including Lifeline, high-cost loop, interstate common line, local switching and any safety net additive) to Cass County Telephone Company and New Florence Telephone Company (the Companies) immediately. At this time, we believe that USAC should continue to disburse monthly support payments to the Companies for the Lifeline program. As we directed before, USAC should suspend all monthly support payments for the high-cost mechanisms.

Thank you for your cooperation in this matter. If you have any questions, please feel free to contact Gina Spade or Tom Buckley at 202-418-7400.

Sincerely,

Chief, Wireline Competition Bureau

Kenneth Matzdorff, Chairman, Cass County Telephone Company and CC:

Chairman, New Florence Telephone Company

Robert Osborn, Cass County Telephone Company

E. Ashton Johnston, Counsel for Cass County Telephone Company

William England, Counsel for New Florence Telephone Company

Susan Duffy, Executive Director, Kansas Corporation Commission

Sandy Reams, Kansas Corporation Commission

Robert Quinn, Executive Director, Missouri Public Service Commission

Wess Henderson, Director, Utility Operations Division, Missouri Public Service Commission

Exhibit 4

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

RE: USF Certification Pursuant to 47 USC 254(e)

CC Docket No. 96-45

Dear Ms. Dortch:

At this time, the Missouri Public Service Commission (MoPSC) hereby declines to certify that rural carriers, Cass County Telephone Company and New Florence Telephone Company, are using their high cost support in accordance with Section 254(e) of the Telecommunications Act of 1996 (47 USC § 254(e) 1996). The MoPSC is conducting further inquiry of these companies and awaiting the receipt of a third party audit. Should the additional inquiry indicate the companies are using the funds in accordance with Section 254(e), the MoPSC will submit its certification letter at that time.

Sincerely,

Robert M. Clayton, III Commissioner

RMC/nd

cc: Irene Flannery

Universal Service Administrative Company 2120 L Street, NW-Suite 600 Washington, DC 20037